JD–22–19
Deerfield Park, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ROHM AND HAAS TEXAS INCORPORATED, A SUBSIDIARY OF DOW CHEMICAL COMPANY

and **CASE 16-CA-218857**

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

Laurie Monahan Duggan, Esq., for the General Counsel.
Christopher C. Antone and ***Joseph G. Galagaza, Esqs.***
(Jackson Lewis P.C.), for the Respondent.
Jay F. Gibson, Esq. (The Dow Chemical Company),
for the Respondent.

DECISION

Statement of the Case

Ira Sandron, Administrative Law Judge. This case is before me on an August 29, 2018 complaint and notice of hearing (the complaint) that stems from unfair labor practice charges that United Steelworkers of America, AFL–CIO–CLC (the Union) filed against Rohm and Haas Texas Incorporated, a subsidiary of Dow Chemical Company (the Respondent or the Company).

I conducted a trial in Houston, Texas, on December 17, 2018, at which I afforded the parties full opportunity to be heard, to examine and cross-examine the one witness, and to introduce evidence.

Issue

Did the Respondent fail and refuse to furnish the Union with necessary and relevant information that it requested in connection with a grievance over staffing levels at the Respondent's Deer Park, Texas facility (the facility) from August 22 through September 3, 2017,[1] due to Hurricane/Tropical Storm/Tropical Depression Harvey (Hurricane Harvey), and

[1] All dates hereinafter occurred in 2017 unless otherwise indicated.

by its unreasonably delay in informing the Union that certain requested documents did not exist?

The Evidence

The parties stipulated most facts and documents (Jt. Exhs. 1–18). Both the General Counsel and the Respondent submitted additional documents, and the General Counsel called one witness, Hank Niscavits (Niscavits), the union chairman at the facility. The Respondent has not argued against his credibility, and I have no reason to doubt the reliability of his testimony. Accordingly, I credit him.

Facts

I find as follows based on the entire record, including testimony, documents, written and oral stipulations, and the thoughtful posttrial briefs that the General Counsel and the Respondent filed.

At all material times, the Respondent has been a corporation with an office and place of business at the facility, engaged in the refining and nonretail sale of petroleum products. The Respondent admits Board jurisdiction as alleged in the complaint, and I so find.

The facility produces chemicals. At the facility, at all times relevant, (1) the Company has recognized the Union as the collective-bargaining representative of hourly control laboratory, maintenance, utilities, and production employees; (2) the parties' June 14, 2013–March 5, 2019 collective-bargaining agreement (Jt. Exh. 1A) was in effect; and (3) the Company has maintained a policy entitled, "Deer Park Operations Maximum Allowable Work Hours and Days Guidelines" (the "fatigue policy") (Jt. Exh. 2). No party has disputed the finding of the arbitrator in a 2014 award that in 2010, the Company proposed, and the Company and the Union negotiated, the fatigue policy (GC Exh. 6 at 2).

Relevant provisions of the collective-bargaining agreement are:

> Articles V and VI set out the grievance-arbitration procedure, providing for four steps and then referral to arbitration.
>
> Article XII, the management-rights clause, provides that the Company has the right to, inter alia, plan, control, and revise plants operations; assign work to employees; and determine the means, methods, processes, and schedules of production.
>
> Article XVII, safety and health, provides that the Company will continue all reasonable precautions for safeguarding the health and safety of its employees and that the parties recognize their mutual obligations to prevent, correct, and eliminate all unhealthy and unsafe working conditions and practices.

Article XXI is a "zipper clause," stating that all agreements not specifically set out in the CBA or referenced in Schedule E expire as of the effective date of the CBA. The fatigue policy is not mentioned in the CBA or listed in Schedule E.

The purpose of the fatigue policy is to provide "reasonable assurance that the safety and health of employees [and others] are not adversely affected because of fatigue caused by excessive work hours." The Exceptions provision states that approval to work beyond the limits described within this guideline will be considered appropriate only when stopping work is reasonably likely to cause an emergency health and safety–related incident or non–compliance with governmental regulations. The provision further states that "[b]usiness criticality is not justification for extending work hours beyond the described limits." One cited example of appropriate exceptions is hurricane duty. The policy goes on to describe maximum consecutive hours of work and maximum consecutive days of work.

On August 19, Hurricane Harvey entered the Caribbean as a tropic storm; became a category 1 hurricane on August 24; and late on August 25, made initial landfall at San Jose Island, Texas, approximately 158 miles away from the facility.

At all times during Hurricane Harvey in late August and early September, the Company kept operations at the facility running with limited staffing. On August 31, the Union filed Grievance 17-12 (Jt. Exh. 3; see also R. Exh. 2). The grievance contended that from on about August 22 to 30, the Company violated the negotiated fatigue policy and the safety and health provision in the CBA (article XVII) by placing employees in an unsafe condition when it made the decision to operate with limited available staff.

On September 7, Niscavits attached an amended second-step grievance concerning violations of the negotiated fatigue agreement and asked that the grievance be moved to the fourth step (Jt. Exh. 12).

On September 19, pursuant to the grievance, Niscavits mailed and emailed Human Resources (HR) Manager Ray Stephens (Stephens) 11 written requests for information (RFIs) (Jt. Exh. 4; see also Jt. Exh. 13, 14), five of which included the following, all for the period from August 22 through September 3 and regarding Hurricane Harvey:

> (2) The names of all leaders and other participants who were part of the emergency operations center (EOC) interactions that had potential impact for the facility and its employees, as well as the EOC sign-in list.
>
> (3) All email and other communications that occurred between the above individuals, including communications related to proper employee staffing to safely operate the facility's operations.
>
> (4) All email and other communications between Site Leader Jeff Garry (Garry) and any and all participants of the EOC that had potential impact for the facility and its employees, including communications related to proper employee staffing to safely operate the facility.

(5) All communications between Garry and business leaders that had potential impact of the facility and its employees, including communications related to proper employee staffing to safely operate the facility.

(11) All email communications from plant leaders and/or operations leaders sent to hourly employees that had potential impact for the facility and its employees, including copies of communications related to proper staffing to safely operate the facility.

On October 6, Stephens responded to the Union's information requests (Jt. Exhs. 5, 15),[2] providing a more comprehensive response than in his September 26 response (GC Exh. 7). As to requests 2–5, the requests at issue, he responded, "This question/information is not pertinent to the grievance and will not be provided." On request 11, he stated, "This information is easily accessible in your own email inbox or your memberships[sic] inbox" and would not be provided.

On October 12 and 13, Niscavits replied to the October 6 response (Jt. Exhs. 6, 7, 8(a)). Regarding requests 2–5, he stated that the information was presumptively relevant; was the same information that the Company had provided in response to a previous, similar grievance (14-01); and was necessary for several reasons, including enabling the Union to know all of the facts of the situation and the people involved in making decisions that led to the grievance, and to verify statements made by the Company. Niscavits attached the RFI from Grievance 14-01 and the Company's responses.

Niscavits also clarified request 11 as referring to separate communications sent from plant leaders and/or operations leaders to hourly employees in their departments that outlined staffing plans and plans to operate or shut down during the Hurricane Harvey period: "These communications are solely owned by the Company and the Union has no access to these as described." He also included text communications in the request (see also R. Exh. 3).

Stephens advised Niscavits on October 17 that the Company was working on the information requests but needed additional time (Jt. Exh. 16). Stephens responded to the requests on November 2 (Jt. Exh. 8). He provided the names requested in request 2 but not the EOC sign-in list. As to request 11, he repeated that those emails were in the possession of the Union's membership and would not be provided.

The parties had a fourth-step grievance meeting on April 3, 2018 (see Jt. Exh. 18). Three days later, Union sub-District Director Ben Lilienfeld renewed the requests for the information that Stephens had not provided (Jt. Exh. 9). Daniel Negrotto, the Company's HR Labor Relations representative, replied on April 13 (Jt. Exh. 10). He repeated the responses that Stephens had given. However, he also stated with respect to request 2 that "EOC sign in lists do not exist."

[2] In their written communications, Company responses are in red; Niscavits' in black or blue.

On September 14, 2018, the Union requested arbitration of Grievance 17–12 and requested that the its processing be abated pending resolution of the instant charges (Jt. Exh. 11).

General Counsel's Exhibit 3 is the Union's August 2014 request for information for Grievance 14–01, which related to alleged violation of the fatigue policy by requiring employees to remain on site for a 24-hour lock-in during a predicted severe freeze without receiving hurricane pay (see GC Exhs. 5, 6). One of the RFIs was for "all e-mail communications between the Site Leader Susan Lewis and the assigned Site Emergency Manager for the EOC, and all participants of the EOC" activated from January 27–29, 2014. The Company provided this information (GC Exh. 4, excluding p. 1; Tr. 34–36). The Union used those emails in its posthearing arbitration brief (GC Exh. 5 at 4). The arbitrator, in finding in the Union's favor in his award of April 3, 2015, referenced written communication between Lewis and her managers (GC Exh. 6 at 6).

The arbitrator determined that the Company could not implement the "lock-in" unless it invoked the provisions of the Hurricane Policy, because the fatigue policy prohibited a 24-hour work schedule without some emergency basis. He stated that the policy, negotiated in 2010, established a limitation on work hours, prohibiting working greater than 16 hours in a 24-hour period, with only a few exceptions, including hurricane (weather) emergency.

Respondent's Exhibit 3 is an October 11 email from Union Committeeman Charles Cowber to Niscavits, including an August 24 email from a supervisor to his team members that described the operating procedures that were being put into effect during Harvey.

Analysis and Conclusions

Failure to Provide Requested Information

An employer is obliged to supply information requested by a collective-bargaining representative that is relevant and necessary to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). To trigger this obligation, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

Requests for information concerning the terms and conditions of bargaining unit employees are presumptively relevant. *Postal Service*, 359 NLRB 56, 56 (2012); *LBT, Inc.*, 339 NLRB 504, 505 (2003); *Uniontown County Market*, 326 NLRB 1069, 1071 (1998). An employer must furnish presumptively relevant information on request unless it establishes legitimate affirmative defenses to production. *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995).

Since a bargaining representative's responsibilities include the administration of the collective-bargaining agreement and the processing and evaluating of grievances thereunder, an employer is obliged to provide information that is requested for the processing of

grievances or potential grievances. *Michigan Bell Telephone Co.*, 367 NLRB No. 74 (2019); *Acme Industrial*, supra at 436; *Postal Service*, 337 NLRB 820, 822 (2002); *Beth Abraham Health Services*, 332 NLRB 1234, 1234 (2000).

It is noteworthy that the arbitrator in 2014 referenced internal management communications in deciding the merits of a grievance involving interpretation of the fatigue policy, reflecting the potential relevance of that information in the instant matter.

The Respondent's brief raises a number of affirmative defenses to production, as follows. Although creative, they are not persuasive.

The Respondent first contends that the decision whether or not to operate the plant was not subject to mandatory bargaining inasmuch as it was "at the core of entrepreneurial control," citing *First National Maintenance*, 452 U.S. 666, 676–678 (1981); therefore, the decision was not subject to mandatory bargaining, and the Respondent was not obliged to respond to RFIs relating to it. However, that case involved an employer's decision to permanently shut down part of its business, not a determination of how to temporarily conduct operations during a hurricane emergency, as was the situation here. In any event, the Union was not seeking participation in the actual making of the decision to continue operations and with what staffing levels. Instead, the Union was seeking information in connection with a grievance that included the issue of the Company's motivations under a negotiated procedure.

The Respondent also cites *Pieper Electric, Inc.*, 339 NLRB at 1232, 1235 (2003), for the above proposition. In *Pieper*, however, the Board held that an optional stock purchase program in which the employer made no matching contributions was not a mandatory subject of bargaining because employees received no emolument of value; accordingly, it did not constitute "wages, hours, or other terms and conditions of employment," and the employer had no obligation to furnish information thereon. Here, in contrast, the RFIs clearly pertained to a grievance over wages, hours, and other terms and conditions of employment. See *NTN Bower Corp.*, 356 NLRB 1072 (2011).

The Respondent cites *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977), for the proposition that even if an RFI relates in some way to a mandatory subject of bargaining, a party to a collective-bargaining relationship is not entitled to information relating to the other's party's deliberative process regarding it. However, that case is inapposite. It did not involve an RFI pertaining to a grievance but to an employer's subpoena duces tecum seeking, inter alia, internal communications between the union and its members going to whether a strike was an unfair labor practice one, as the General Counsel contended. The Administrative Law Judge noted the quasi-fiduciary relationship between a union and its members and that negotiations were pending.

The Respondent further argues that the Union cannot complain about the Company's application of the Fatigue Policy because (1) the Union waived such right by agreeing to the management-rights clause in the CBA, and (2) the policy expired when the new CBA went into effect since it was not included among the agreements recited in the "zipper clause."

Waiver is not lightly inferred and must be "clear and unmistakable." *Weyerhaeuser NR Co.*, 366 NLRB No. 169, slip op. at 2 (2018), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693,709 (1983); *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061 (1999). Thus, the part asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Weyerhaeuser*, ibid, citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). Moreover, the party asserting waiver bears the burden of proof. Ibid; *TCI of New York*, 301 NLRB 822, 824(1991).

The Respondent's arguments fail to meet the test for finding a waiver. Regardless of those contractual provisions, the Respondent stipulated that at all times material, the negotiated fatigue policy has been in effect. Moreover, the 2014 grievance concerned the Company's conduct on January 28 and 29, 2014—after the date that the current CBA went into effect—and the Company did not dispute the applicability of the fatigue policy. Thus, the fatigue policy continued in effect after the management's rights and zipper clauses were negotiated and made effective in 2013.

Finally, the Respondent argues that the Union already had or could have just as easily gathered from unit employees or union stewards any emails that employees had received from management and that the Respondent therefore had no obligation to provide them. The Company points to Niscavits' receipt from a union committeeman an email from a supervisor to his team members. However, it is well settled Board law that the fact a union might have been able to obtain the information through other sources, including its own stewards and employees, does not defeat the union's right to obtain such information from the Respondent. See, e.g., *Illinois-American Water Co.*, 296 NLRB 715 (1989), enfd. 933 F.2d 1368 (7th Cir. 1991); *Interstate Food Processing*, 283 NLRB 303, 305 (1987); *Bel-Air Bowl, Inc.*, 247 NLRB 6, 6 (1980). Indeed, to hold otherwise would be to shift the burden of obtaining the information to the union, thereby undermining the purpose behind requiring employers to provide presumptively relevant information. Moreover, the Respondent could not say that the Union in had fact received from employees any and all such communications from management—the purpose behind the request.

In sum, I conclude that the Respondent violated section 8(a)(5) and (1) by failing and refusing to furnish the Union with the information that it requested in items 3, 4, 5, and 11.

Unreasonable Delay

A well-established corollary to the requirement that an employer must provide relevant information to a union in a reasonably timely manner is that an employer must timely respond to such a request when the employer believes it has grounds for not providing that information. *Michigan Bell*, above at slip op. 4, citing *Columbia University*, 298 NLRB 941, 945 (1990). Thus, an unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). In determining whether an employer has

unlawfully delayed responding to an information request, the Board considers the "totality of the pertinent circumstances." *Michigan Bell*, above at slip op. 4 (7-week delay without justification found unreasonable), citing *Endo Painting Service*, 360 NLRB 485, 485 (2014).

Here, the Union originally requested the EOC sign-in lists in its September 19, 2017 RFI, and continued to reiterate that request, yet the Respondent did not advise the Union until April 12, 2018—almost 7 months later—that no such information existed. The Respondent offered no explanation to the Union, at trial, or in its brief, of why it took so long to determine the nonexistence of those documents. In the absence thereof, I conclude that the Respondent unreasonably delayed in providing its response of nonexistence of documents to the Union, and thereby violated Section 8(a)(5) and (1).

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union with information that it requested that was relevant and necessary for processing its grievance over the Respondent's decision to keep operations running at the facility with limited staff, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

4. By its unreasonable delay in furnishing the Union with a response that no documents were in existence in response to information that it requested that was relevant and necessary for processing the above grievance, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

Remedy

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Rohm and Haas Texas Incorporated, a subsidiary of Dow Chemical Company, Deerfield Park, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish the Union with information that it requests that is relevant and necessary for it to process grievances on behalf of unit employees.

(b) Unreasonably delaying responding to the Union's request for information that is relevant and necessary for it to process grievances on behalf of unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

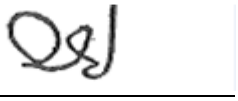
(a) Provide the Union with information that it requested concerning internal management relating to staffing levels at the facility during Hurricane Harvey, in connection with Grievance 17–12.

(b) Within 14 days after service by the Region, post at its facility in Deerfield Park, Texas, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 19, 2017.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 1, 2019



Ira Sandron
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

United Steelworkers of America, AFL–CIO–CLC (the Union) represents a unit of our hourly control laboratory, maintenance, utilities, and production employees.

WE WILL NOT fail and refuse to provide the Union with information that it requests that is relevant and necessary for it to fulfill its functions as your collective-bargaining representative, including the processing of grievances.

WE WILL NOT unreasonably delay in responding to the Union's requests for information that is relevant and necessary for it to fulfill its functions as your collective-bargaining representative, including the processing of grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL provide the Union with information that it requested concerning internal management communications relating to staffing levels during Hurricane Harvey, in connection with Grievance 17–12.

ROHM AND HAAS TEXAS INCORPORATED, A SUBSIDIARY OF DOW CHEMICAL COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (682) 703-7489.